EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ePlus, Inc.,
Plaintiff,
versus 309 CV 620
Lawson Software, Inc.
Defendant

before: HONORABLE ROBERT E. PAYNE
Senior United States District Judge

August 10, 2010
Richmond, Virginia

Phone Conference

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Official Court Reporter
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THE COURT: Hello.

MR. MERRITT: Hello, Judge Payne. Can you hear us?

THE COURT: Yes, I can. It always helps when you push the right button.

All right. This is ePlus against Lawson, 3:09 CV 620.

And there has been some papers filed at the request of ePlus following an argument on ePlus' motion in limine. Excuse me. Lawson's motion in limine number 3 to preclude Dr. Russell Mangum from testifying at trial.

And you submitted a decision to read i4i Limited Partnership. There have been some briefs filed.

First, there is a question of whether -- I don't understand what the positions of the parties are -- whether the parties actually agreed that the deposition of experts would serve as rebuttal expert reports. It looks to me like that the two of you are at odds on that position.

What is the position of the plaintiff and the support that you have for it? And the position of the defendant?

Please, starting, with the plaintiff.

But first, who is here for plaintiff and who for the defendant?

Starting with the plaintiff.

MR. MERRITT: Your Honor, this is Craig Merritt and Henry Willett from Christian and Barton on behalf of the plaintiff.

Mr. Robertson and Mr. Strapp are on the line as well.

MR. CARR: Judge, this is Dabney Carr with Troutman Sanders on behalf of Lawson Software. And Dan McDonald and Rachel Hughey from Richmond Coal are also on the line.

THE COURT: Start with the first issue, ePlus.

MR. MERRITT: Your Honor, this is Craig Merritt.

Others can correct me if I have any of this wrong, but I am advised that the parties, I think primarily Mr. Robertson and Mr. McDonald, had a discussion arising out of the fact that the parties had agreed some time ago that there would not be rebuttal written expert reports. As a consequence the idea was that when these experts gave their depositions

the parties would be able to explore further that which had been disclosed in their reports and to allow the experts an opportunity to respond to each other's criticisms and that whatever was in those transcripts would be considered part of the expert disclosures --

MR. CARR: Judge --

MR. MERRITT: -- and usable at trial.

THE COURT: What is the position of Lawson?

MR. McDONALD: Your Honor, this is Dan McDonald.

My recollection of that -- and there was nothing that ePlus supplied that is inconsistent with my recollection -- is that to streamline the case we stopped the third round of experts. We had two rounds. We had the original report and rebuttal expert, written reports in this case. We didn't have a third round of surrebuttal reports. And the agreement was any surrebuttal would be covered by the depositions as well as any inquires people wanted to go into regarding the original reports that the experts provided. Certainly there is nothing even about what I heard

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counsel for ePlus say that would indicate that the parties agreed that the original reports could be deficient and you could fix that by depositions that occurred later in the case. That was not the agreement at all. It was we could ask about what the opening expert thought about the opposing party's rebuttal expert report when the opening expert was deposed. So there is no agreement here that would allow curing defects in the original report. And I would also note that ePlus did not raise that in their opposition to this motion in the first place.

MR. ROBERTSON: Your Honor, this Mr. Robertson. Mr. McDonald and I had this conversation. I don't think we had this agreement.

THE COURT: What? Say again. I lost you. I don't see --

MR. ROBERTSON: This is Mr. Robertson. And Mr. McDonald and I had this agreement with respect to, you know, the expert reports and how the depositions would serve as part of the rule 26 disclosures. Let me just say with respect to damages which were focused on here

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today, there was Mr. Mangum's initial report, and then there is a response report a month later from Mr. Green. Excuse me. I should say Dr. Mangum, Dr. Green. And no opportunity for Dr. Mangum to respond to Dr. Green's criticisms other than in his deposition. So clearly the deposition by agreement was intended to provide an opportunity to respond to any criticisms. I think that is what I heard Mr. Merritt and Mr. McDonald just agree on. So I think I am trying to get down to the basic nub of the question.

Problems with the initial report. We are trying to respond to criticisms and have an opportunity to have rebuttal because the schedule became so truncated.

THE COURT: No, wait a minute. Wait a minute. You are singing two different tunes here. There is a difference between whether you are going to respond to something in Mangum's, in his deposition, is going to respond to some criticism of his report and whether he was going to issue another report. Those are two different things.

MR. ROBERTSON: Well, we had an agreement,

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Your Honor, that there would not be a rebuttal report, but that the deposition could serve as the equivalent of a rebuttal report. That was the essence of our agreement. I am not hearing anything that Lawson is saying that contradicts that.

THE COURT: Wait a minute. Wait a minute.

MR. ROBERTSON: The schedule that we had and what we were trying --

THE COURT: Quit talking. Stop talking.

Mr. McDonald, did you agree or not agree that the deposition would serve as a rebuttal report, that is, Mangum would have the opening, response would be by Green, and the deposition of Mangum would be a rebuttal report? Did you or did you not have that agreement?

MR. McDONALD: We agreed, yes, Your Honor, that the deposition would be -- I would call really the surrebuttal, to be clear, because I would view Green, our damages expert, as the rebuttal witness. And then Mr. Mangum would have the chance to surrebut his report. That's what the agreement was.

THE COURT: I think the term is opening report, response report, and the reply,

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rebuttal report. But that is the term I am going to use.

MR. McDONALD: Okay.

THE COURT: Now that is taken care of.

Now, what I perceived in the briefing was that Lawson attacked Mangum's report in its opening brief as lacking improper methodology by use of litigation settlements and basing his conclusions on speculation and guess work under the basic arguments where the litigation settlements were of minimum probative value. They were, in substance, because of their context in which they were arrived at, they were of limited probative value because they were years after the hypothetical negotiation would have occurred. That they, the reports, ignores Mangum's report, ignores ePlus' own valuation in 2002 of $12,000. That lump sum settlements under the Lucent decision are not generally probative of a reasonable royalty on a running basis. That the royalty base did not rely on actual sales but projected sales. Not based on any real data, but based on expert reports for ePlus in the SAP case. That there was over inclusion in the royalty base by

on whether scientific, technical, or other specialized knowledge would assist the trier of the fact to understand the evidence or to determine a fact in issue. And said that it is the trial judge's job to insure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. And the locus of the obligation was found in the rule and was found in the part about whether the knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.

And the rule said the Supreme Court was to assure that the testimony, whatever source it came from, would be reliable and relevant. It then went on to point out, citing Judge Becker's opinion in the Downing case, that there is another component to relevance, and that is fit. Additional consideration, said The Court, under rule 702 -- and another aspect of relevancy is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a dispute. This consideration has been aptly described by Judge Becker as one of

fit. Fit is not always obvious, and scientific validity for one purpose is not only scientific validity for other unrelated purposes.

The Court then went on to talk about the measure of scientific testimony. Has it been tested? Is the technique or theory tested? Has there been peer review? Is there a known rate of error? And then it allowed consideration of general acceptance, which is in part how the issue came to the Supreme Court. Because up until then the rule of general acceptance and scientific community enunciated in Frye had in fact been the criterion for the admissibility of evidence in the federal courts.

The Court made perfectly clear that the focus of the trial judge's gatekeeping responsibility is on method and principles not upon the conclusions. There is no question about that. That aspect of i4i is not at all unusual. It has in fact been clear, if it weren't before then, since Daubert was decided. That is found at 2797 and 2798 of 113 Supreme Court.

So, too, is the concept that vigorous

cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. So that principle was not announced in i4i, and it is not new. It is a fundamental precept by which all courts are required to judge the admissibility of evidence and to draw the line between the admissibility of evidence and the conclusions being reached.

Kumho then took the matter further. Kumho held that the basic principles of Daubert, the gatekeeping function, that is, applied to scientific testimony, and indeed to all expert testimony. Indeed that wasn't even a subject of disagreement by the time it got to the Supreme Court.

And there they were really basically dealing with in great measure with the experience-based testimony. But they once again enunciated that the gatekeeping inquiry must be tied to the facts of the particular case, i.e., the fit. Citing Downing and citing the Daubert enunciation.

In Kumho itself the Supreme Court said as

it cited itself from the Joyner decision, nothing in either Daubert or the federal rules of evidence requires a District Court to admit opinion that is connected to existing data only by the ipse dixit of the expert. Ipse dixit means that it is so because I say it is so. That same precept has been adopted in Pugh against Louisville Ladder, Incorporated in 361 federal appendix, and citing a number of cases, including Joyner, holding that the district court discretion includes the discretion to find that there is, citing Joyner, simply too great an analytical gap between the data and the opinion proffered in deciding whether or not the proper evidence is of the ipse dixit variety. In fact, the two text parts in footnote four of that case, Pugh, make quite clear the relationship and the nexus between them.

In Bright against American Household Products the fourth circuit pointed out that Daubert aims to prevent expert speculation. And to my knowledge those are the fundamental rules by which rule 702 is to be applied.

Now, I have studied the deposition

lump sum payments for the most part that in fact have been converted by this man, Mangum, into running royalty rates, and you consider that the base he used is in every instance an assumed base for the quantum of sales in positing his analysis, and then you consider at the same time that for no valid economic reason that can be ascertained from the face of his report that he has thrown out three out of five settlement agreements; and when you consider that ePlus itself valued these rights at a far lesser figure then one has to but conclude that the bench mark constructed by this expert bears virtually no resemblance to the bench mark constructed by the expert used by the expert in i4i. So I agree that while litigation settlements have minimum probative value, they can be considered. But in the facts of this case, the way he went about it, it establishes a very shaky bench mark against which to start his calculations, and the predicate settlements also suffer from that, from the defect that are not generally probative under Lucent, that is, lump sum settlements are not generally probative under Lucent of a reasonable royalty.

Further, I have been back and studied how it is that this expert took a range of 2.5 to 3.7 and got it to 5.6. That is a basic doubling -- excuse me -- to a range of 5 to 6. That is essentially a doubling of the royalty rate. He does it by saying that certain of the factors of Georgia Pacific effectuate an increase, certain factors are neutral, without explaining what part of which one of those factors accounts for a doubling or a significant increase, nor does he explain how he factors in the aggregate to actually achieve an increase. He just makes a bunch of general statements about each of the factors, concludes that it is either statistically neutral or indicating a higher royalty rate. He doesn't say it requires arrival at a higher royalty rate in every case. He says it indicates or suggests, thereby indicating to me a considerable speculation.

What that all boils down to when you look at his factors, I think it is 5 and 6, and then 8313 is this. That is the quintessential definition of an ipse dixit. 2.5 to 3.7 goes to a range of 5 to 6 because I say so. And I am an expert. And that is exactly what he has done. And that is a methodology flaw, not a disagreement with his facts. That is just a methodology flaw that renders his analysis such as to be sufficiently unreliable that it will not be healthy -- help the finder of the fact determine an issue or understand the evidence or to determine a fact in issue. And, in fact, it posits a very real risk of the very threat that is presented by having or allowing experts to posit ipse dixit statements.

You get a person with a big credential who comes in well dressed, is impressive, says it is so because I say so, and the jury is confused and apt to be -- and apt to be impressed by the credential rather than the analytical method. And rule 403, which Daubert says has to be applied in applying it, or has to be considered in applying rule 702, says that that kind of evidence is to be kept out.

So I view this as certainly not -- I don't think it is The Court's job to make the judgment about whether, about the factual underpinnings or the validity val non of the

conclusions. I know it is not. We have been taught to do this, to take that approach since, at least since Daubert, if not before. But certainly since Daubert. That is the approach of taking in this circuit, and drummed in to the heads of all district judges in every case that is decided on this issue. And it is the methodology that is flawed. I don't address the conclusions. For those reasons the motion number 3 will be granted, and the motion number 1 and 2, therefore, are denied as moot.

I believe that solves, or that deals and takes care of those motions; is that right? Is there anything left? Is there anything left?

MR. McDONALD: Well, settlement agreements themselves, Your Honor, are subject of a motion in limine number one. Not sure by saying it is moot are you saying the expert is the only way that would come in? They are not coming in any way? If that is right, we are fine. But if that is leaving the door open to those being somehow presented to the jury and those million dollar numbers getting in front of the jury we still would want that motion decided and granted as well.